

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

Ken Tschumper,

Complainant,

v.

**PROBABLE CAUSE
ORDER**

Greg Davids, People for Davids
Committee, Joe Sheffers, Fred Sandvik,
and Fred Wescott of Hickory Orchards,
LLC,

Respondents.

The above-entitled matter came on for a probable cause hearing before Administrative Law Judge ("ALJ") Ann O'Reilly on October 25, 2012. This matter was convened to consider a campaign complaint filed under the Fair Campaign Practices Act by Ken Tschumper on October 18, 2012.

On October 22, 2012, the ALJ issued a Notice of Determination of Prima Facie Violation and Notice of and Order for Probable Cause Hearing which found a prima facie violation of Minn. Stat. § 211B.15, subd. 2 as against Fred Sandvik and Fred Wescott of Hickory Orchards, LLC, but dismissed the allegations as to Greg Davids, the People for Davids Committee, and Joe Sheffers.

A probable cause hearing was conducted by telephone conference on October 25, 2012. The probable cause record closed on October 25, 2012, with the completion of the probable cause hearing.

Karl Sonneman, Attorney at Law, appeared with and on behalf of Complainant Ken Tschumper ("Complainant"). R. Reid LeBeau II, Jacobson, Buffalo, Magnuson, Anderson & Hogen, appeared on behalf of Fred Sandvik and Fred Wescott of Hickory Orchards, LLC ("Respondents").

Based upon the record and all the proceedings in this matter, and for the reasons set forth in the attached Memorandum incorporated herein, the Administrative Law Judge makes the following:

ORDER

IT IS HEREBY ORDERED THAT:

1. There is probable cause to believe that Respondents Fred Sandvik and Fred Wescott of Hickory Orchards, LLC violated Minn. Stat. § 211B.15, subd. 2 by contributing something of monetary value to candidate Greg Davids when they allowed a campaign sign for Greg Davids to be placed upon real property owned by their limited liability corporation, Hickory Orchards, LLC.
2. This matter is referred to the Chief Administrative Law Judge for assignment to a panel of three Administrative Law Judges, pursuant to Minnesota Statute § 211B.35.
3. Should the Parties decide that this matter may be submitted to the assigned Panel of Judges based on this Order and the record created at the Probable Cause hearing and subsequent filings, without an evidentiary hearing, they should notify the undersigned Administrative Law Judge by **12:00 p.m. on Friday, November 2, 2012**. If both Parties do not agree to waive their right to an evidentiary hearing, this matter will be scheduled for an evidentiary hearing in the near future.

Dated: October 29, 2012

s/Ann O'Reilly

ANN O'REILLY
Administrative Law Judge

MEMORANDUM

Complainant Ken Tschumper is the DFL Party's endorsed candidate for Minnesota House of Representatives from District 28B.¹ Greg Davids is the Republican endorsed candidate for the same seat. Respondents Fred Sandvik and Fred Wescott are the owners of Hickory Orchard, LLC, a limited liability company formed under Minn. Stat. Chap. 322B that does business in Minnesota.² Hickory Orchard, LLC operates a relatively small (approximately 100 acre) apple farm located off of Highway 25 in a rural area six miles outside of LaCrescent, Minnesota.³

Tschumper's Complaint alleges that Respondents violated Minn. Stat. § 211B.15, subd. 2, which prohibits corporations from making contributions of "thing[s] of monetary value" directly to candidates, by allowing a sign for Greg Davids to be placed on Hickory Orchard's property.

¹ House District 28B includes all of Fillmore and Houston Counties and the city of Lanesboro.

² Complaint attachments; Testimony of Fred Sandvik.

³ Test. of F. Sandvik.

Respondents do not dispute the fact that a Greg Davids campaign sign is located on real property owned by Hickory Orchards, LLC.⁴ According to Sandvik, he received a call from a field foreman he employs who was asked by a neighbor of Tschumper (John Strehl) if he could put a sign for Greg Davids on real property owned by Hickory Orchards.⁵ Being unfamiliar with Minnesota campaign laws, Sandvik allowed the sign to be placed on the property.⁶

On the same day that Sandvik received notice of Tschumper's Complaint in this matter, he received a telephone call from Tschumper.⁷ Tschumper told Sandvik that Greg Davids' campaign had filed an earlier campaign complaint against Tschumper's campaign and that Tschumper had filed this Complaint in response to the Davids' complaint.⁸ In response, Sandvik offered to immediately take the sign down and offered to allow Tschumper to put up his own campaign sign on the property.⁹ Tschumper declined this offer and instead urged Sandvik to call Greg Davids and ask Davids to dismiss his campaign's complaint against Tschumper.¹⁰ Sandvik understood this to mean that if he [Sandvik] were to get Davids' campaign to dismiss its complaint against Tschumper, Tschumper would dismiss his Complaint against Sandvik, Wescott, and Hickory Orchards.¹¹ Tschumper did not deny this exchange.

Legal Standard

The purpose of a probable cause determination is to determine whether, given the facts disclosed by the record, it is fair and reasonable to hear the matter on the merits.¹² If the judge is satisfied that the facts appearing in the record, including reliable hearsay, would preclude the granting of a motion for a directed verdict, a motion to dismiss for lack of probable cause should be denied.¹³

A judge's function at a probable cause hearing does not extend to an assessment of the relative credibility of conflicting testimony. As applied to these proceedings, a probable cause hearing is not a preview or a mini-version of a hearing on the merits; its function is simply to determine whether the facts available establish a reasonable belief that the Respondents have committed a violation. At a hearing on the

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *State v. Florence*, 239 N.W.2d 892, 902 (Minn. 1976).

¹³ *Id.* at 903. In civil cases, a motion for a directed verdict presents a question of law regarding the sufficiency of the evidence to raise a fact question. The judge must view all the evidence presented in the light most favorable to the adverse party and resolve all issues of credibility in the adverse party's favor. See, e.g., Minn. R. Civ. P. 50.01; *LeBeau v. Buchanan*, 236 N.W.2d 789, 791 (Minn. 1975); *Midland National Bank v. Perranoski*, 299 N.W.2d 404, 409 (Minn. 1980). The standard for a directed verdict in civil cases is not significantly different from the standard for summary judgment. *Howie v. Thomas*, 514 N.W.2d 822 (Minn. App. 1994).

merits, a panel has the benefit of a more fully developed record and the ability to make credibility determinations in evaluating whether a violation has been proved, considering both the record as a whole and the applicable evidentiary burdens and standards.

Fair Campaign Practices Act

Minnesota Statutes § 211B.15, subd. 2, prohibits corporations from making direct or indirect political contributions to candidates, and provides as follows:

A corporation may not make a contribution or offer or agree to make a contribution directly or indirectly, of any money, property, free service of its officers, employees, or members, or thing of monetary value to a major political party, organization, committee, or individual to promote or defeat the candidacy of an individual for nomination, election, or appointment to a political office. For the purpose of this subdivision, "contribution" includes an expenditure to promote or defeat the election or nomination of a candidate to a political office that is made with the authorization or expressed or implied consent of, or in cooperation or in concert with, or at the request or suggestion of, a candidate or committee established to support or oppose a candidate but does not include an independent expenditure authorized by subdivision 3.

Minnesota Statutes § 211B.15, subd. 3, states that "independent expenditure" has the meaning given it in section 10A.01, subdivision 18. That section defines "independent expenditures" as:

an expenditure expressly advocating the election or defeat of a clearly identified candidate, if the expenditure is made without the express or implied consent, authorization, or cooperation of, and not in concert with or at the request or suggestion of, any candidate or any candidate's principal campaign committee or agent. An independent expenditure is not a contribution to that candidate. An independent expenditure does not include the act of announcing a formal public endorsement of a candidate for public office, unless the act is simultaneously accompanied by an expenditure that would otherwise qualify as an independent expenditure under this subdivision.¹⁴

For purposes of Section 211B.15, "corporation" is defined to include a limited liability company formed under chapter 322B that does business in this state.¹⁵

It is undisputed that Hickory Orchards, LLC is a for-profit limited liability company doing business in Minnesota. Accordingly, Hickory Orchards, LLC meets the definition of "corporation" under Minn. Stat. § 211B.15, subd. 1(1). Respondents concede that a campaign sign promoting the election of Greg Davids was placed on property owned by Hickory Orchards, LLC by a neighbor of Tschumper. Respondents did not argue during

¹⁴ Minn. Stat. § 10A.01, subd. 18.

¹⁵ Minn. Stat. § 211B.15, subd. 1(3).

the probable cause hearing that the placement of the sign on corporate property was an “independent expenditure.”

Arguments

At the probable cause hearing, Respondents argued that the violation was “de minimus,” isolated, inadvertent, and having minimal impact on voters. Sandvik, who states that he does not support either candidate, argued that he has been “thrown under the bus” by the Davids and Tschumper campaigns, and that he has been unfairly caught in their political crossfire.¹⁶ As a result, Respondents moved to dismiss the Complaint on the basis that the Complaint was brought for an “improper purpose” because it was initiated in retaliation for a campaign complaint filed by Greg Davids’ campaign against Tschumper.

In the alternative, Respondents asserted that if probable cause is found to exist, that a reprimand be the only penalty imposed due to the unintentional nature of the violation and the minimal impact on voters.

To that end, Respondents argued that neither Sandvik nor Wescott are politically active individuals and both were unfamiliar with Minnesota campaign laws. As a result, Respondents maintained that the violation was unintentional. Sandvik further testified that he offered to immediately remove the sign once he was notified of the violation.

In addition, Respondents argued that the single sign is located in a very rural area along Highway 25, approximately 6 miles outside of LaCrescent, Minnesota. Respondents maintained that the sign is not located in a high traffic area, and is in a location traveled mostly by local residents. Therefore, Respondents asserted that any impact of the sign on voters would be minimal, at best.

Tschumper disputed that assertion and testified that Highway 25 is a thoroughfare for the area, and that the location has good visibility for passing traffic, which is why he has his own signs posted near that area. Tschumper did not dispute Sandvik’s testimony about the discussions between Sandvik and Tschumper regarding the motivation for bringing the Complaint.

Analysis

A corporation is prohibited from contributing “anything of monetary value” to a candidate or committee to promote or defeat the candidacy of an individual for election to public office.¹⁷ A “disbursement” is defined, as “an act through which money, property, office, or position or *other thing of value is directly or indirectly promised, paid, spent, contributed, or lent*, and any money, property, office or position or other thing of value so promised or transferred..¹⁸ Similarly, “contribution” is defined as “*anything of*

¹⁶ Test. of F. Sandvik.

¹⁷ Minn. Stat. § 211B.15, subd. 2.

¹⁸ Minn. Stat. § 211B.01, subd. 5 (emphasis added).

monetary value that is given or loaned to a candidate or committee for a political purpose....”¹⁹

There is no requirement that a corporate contribution be intentional or knowing in order to violate Minn. Stat. § 211B.15. Instead, the statute strictly prohibits a corporation from making contributions directly or indirectly to a candidate or committee to promote the election or defeat of a candidate for office. Allowing a campaign sign to be placed on corporate property is a contribution having some monetary value to a candidate.

Based on the record presented, the Complainant has demonstrated probable cause to believe that Respondents Sandvik, Wescott and Hickory Orchards, LLC violated Minn. Stat. § 211B.15, subd. 2. The circumstances giving rise to the violation and the Complaint, while compelling, as well as the impact that the single sign may have had on voters, all go to the issue of penalty.

The Administrative Law Judge finds that it is reasonable to require the Respondents to go to hearing on the merits and to allow a panel of three Administrative Law Judges to determine whether the Respondents violated Minn. Stat. §§ 211B.15, subd. 2, and, if so, what penalty is appropriate. Should the Parties decide to waive the evidentiary hearing and submit the matter on the record made at the Probable Cause hearing with further written submissions, they must notify the ALJ by **12:00 p.m. on Friday, November 2, 2012.**

A.C.O.

¹⁹ Minn. Stat. § 211A.01, subd. 5 (emphasis added).